in the

Supreme Court

of the

United States

NO. 79-786

DAVID JASON MARKS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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in the

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NO.

DAVID JASON MARKS,

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PETITION FOR WRIT OF CERTIORARI

COMES NOW the Petitioner, DAVID JASON MARKS, by and through his undersigned attorney, and pursuant to Supreme Court Rule 19 petitions this Honorable Court for a Writ of Certiorari in this cause, in support of which he states the following:

1. That Petitioner seeks review of United States -v- Marks, ____ F.2d. ____ (5th Cir., decided October 1, 1979).

2. That the date of the judgment sought to be reviewed is October 1, 1979.

3. That the Petition for Rehearing of the decision filed on October 1, 1979, was denied on October 31, 1979.

4. That this Honorable Court possesses jurisdiction in this cause to review the judgment in question by Writ of Certiorari pursuant to 28 U.S.C. 1254 (1).

5. That the questions presented for review are the following:

(A)

WHETHER ANY AGENT OF THE FEDERAL GOVERNMENT MAY CIRCUMVENT THE REQUIREMENTS OF MIRANDA -v- ARIZONA, 384 U.S. 436, 86 S. CT. 1602 (1966) AND UTILIZE A RUSE IN OBTAINING INCRIMINATING INFORMATION FROM A DEFENDANT BY INTERROGATION IN AN UNDERCOVER CAPACITY WHERE A CRIMINAL INVESTIGATION HAS FOCUSED UPON DEFENDANT AND PROBABLE CAUSE CLEARLY EXISTS FOR DEFENDANT'S ARREST WITHOUT AFFORDING SAID DEFENDANT HIS MIRANDA WARNINGS?

(B)

WHETHER A TRAIL COURT ERRS IN DENYING A DEFENDANT'S MOTION FOR

JUDGMENT OF ACQUITTAL AS TO A CONSPIRACY TO DISTRIBUTE, POSSESSION WITH INTENT TO DISTRIBUTE, AND DISTRIBUTING COCAINE CHARGES WHERE THE GOVERNMENT HAS FAILED TO PROVE THE NECESSARY ELEMENT OF A DEFENDANT'S CRIMINAL INTENT BY PROVING OVERT ACTS OF SUCH A DEFENDANT AND MERELY SHOWS LANGUAGE OF SUCH DEFENDANT WHICH CONSTITUES EVIDENCE THAT FAILS TO EXCLUDE THE REASONABLE HYPOTHESIS OF SAID DEFENDANT'S GUILT?

(C)

WHETHER A TRIAL COURT ERRS AT A "JAMES" HEARING IN FINDING SUFFICIENT INDEPENDENT EVIDENCE OF A DEFENDANT'S PARTICIPATION IN A CONSPIRACY TO ALLOW HEARSAY STATEMENTS OF HIS ALLEGED CO-CONSPIRATOR AGAINST HIM WHERE SUCH INDEPENDENT EVIDENCE MERELY CONSISTS OF WORDS USED BY THE DEFENDANT AND THERE IS NO PROOF ALIUNDE OF SAID DEFENDANT'S CRIMINAL INTENT?

6. That the Fifth Amendment to the United States Constitution states as follows:

No person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces, or in the Milita, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limbs; nor shall be compelled in a criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation.

7. That the Sixth Amendment to the United States Constitution states as follows:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crimes shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have Assistance of Counsel for his Defense.

8. That Title 21, Section 841 (a) of the United States Code states as follows:

(a) Except as authorized by this sub-chapter, it shall be unlawful for any person knowingly and intentionally — (1) to manufacture,

distribute or dispense or possess with intent to manufacture, distribute, or dispense any controlled substance or (2) to create, distribute, or dispense or possess with intent to distribute or dispense, a counterfeit substance.

9. That Title 21, Section 846 of the United States Code states as follows:

Anyone who attempts or conspires to commit any offense defined in this sub-chapter is punishable by imprisonment or fine or both which not to exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

10. That Title 18, Section 2 of the United States Code states as follows:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

11. That the facts material to the consideration of the questions presented are as follows:

On April 14, 1977, Special Agent Fred C. Ball of the Drug Enforcement Administration had occasion, in

Tucson, Arizona, to have a telephone conversation with one Gregory Vendetti in San Francisco, California. Such conversation concerned the distribution of 10 pounds of cocaine to Ball and Special Agent Alan E. Bachelier by Vendetti. Vendetti wanted the agents to come to San Francisco and stated his source of supply for the cocaine was the Miami-Fort Lauderdale area.

Ball advised Vendetti there was no point in having the cocaine shipped across country and, furthermore, he felt it would facilitate the transaction for them to go to Florida with Vendetti and deal directly with the source of supply.

Subsequently, Vendetti traveled to Tuscon whereupon the agents met with him at the Pueblo Sheraton Hotel. Discussions were had concerning the pending ten pound purchase of cocaine and Vendetti reiterated his access to cocaine in the Miami-Fort Lauderdale area. Vendetti stated he would rent rooms for the agents in Ft. Lauderdale.

The agents required a couple of days to get that much money and stated Vendetti would have the opportunity to view the money prior to going to Miami. While in Tuscon, the agents showed Vendetti $95,000 in a government vehicle.

On April 19, 1977, the agents arrived in Miami and proceeded, according to Agent Ball, to the Ramada Inn. Upon their arrival there Bachelier telephoned Vendetti and subsequently the agents met with Vendetti whereupon he advised he had access to five pounds of cocaine and the individuals wished to do two five pound deals.

Vendetti stated the purchase price was $25,000 per pound and requested to see the money. Once inside the motel room, Vendetti was shown $250,000 in official funds which he counted.

Vendetti left the motel room and requested the agents call him at 7:00 p.m. so that Vendetti could tell them when the cocaine would be delivered. Ball called Vendetti at 7:00 p.m. and Vendetti indicated he would call back when he was in possession of the cocaine.

Approximately one and one-half hours later, Vendetti called back and indicated he was going to get the cocaine in Miami in about ten minutes and would meet the agents in their motel lounge. When Vendetti had not arrived as of 10:20 p.m., a decision was made to terminate whereupon the agents departed the area. However, after leaving Agent Tabeau realized he had not obtained room receipts for reimbursement for the rooms and the agents agreed to go back to the motel to pick up the vouchers.

Upon their arrival at the motel, the agents observed Vendetti in the parking lot area with the Petitioner. At such time Vendetti was carrying a briefcase.

They entered the lobby area, whereupon Ball and Bachelier went into the motel. Vendetti entered the lounge area with Ball and Petitioner. Ball sat with Vendetti at the bar and Petitioner was seated alone at a table eight or ten feet behind them.

Ball explained they had left for fear of a rip-off and Vendetti stated he had five pounds there in the suitcase.

Subsequently, Petitioner joined the area of the conversation and conversed briefly with Vendetti. Ball and Bachelier were unable to hear the conversation between Petitioner and Vendetti at that time and Petitioner subsequently went back down and sat at the table he was at.

Ball inquired of Vendetti who that was, at which time Vendetti replied it was his partner without whom they would not have the two kilo front.

Ball, Bachelier and Vendetti then proceeded up to the motel room whereupon Vendetti opened the suitcase and displayed several pounds of cocaine. After a small portion was filed tested and produced a positive reaction, Vendetti was placed under arrest.

Ball and Bachelier then went back down to the lounge area and Bachelier went over to the table where Petitioner was sitting and conversed with Petitioner. Bachelier then proceeded over to Ball in the lobby and advised him he felt his conversation with Petitioner provided probable cause for his arrest.

Ball then approached Petitioner and advised him he was under arrest for violation of the Federal Narcotics laws.

Prior to the aforementioned, Ball had had conversation with Vendetti in San Francisco, while Petitioner was never mentioned in Ball's conversations either with Vendetti or another agent in California, Agent Vorhees. Furthermore, while in Tucson Vendetti indicated his source of supply was a Cuban entertainer

in Miami. Petitioner's name likewise never came up and Petitioner was never present in Tuscon. Vendetti at no time ever indicated he was going to bring anybody with him.

The agents never saw Petitioner in possession of the briefcase and Petitioner never asked where they were going with the briefcase or tried to restrain Vendetti from going out of his eye sight. Likewise, Petitioner was never present in the room when the briefcase was opened.

No latent prints of any value were found on any of the packages containing the cocaine.

Vendetti stated he had traveled to Tuscon, Arizona and met with people whom he was unaware were special agents of the Drug Enforcement Administration. He conversed with them concerning cocaine and was shown money by Ball and Bachelier. Additionally, discussions were had concerning a trip to Florida.

Vendetti subsequently traveled from Tucson to Florida and was picked up at the airport by Petitioner. Vendetti explained to Petitioner the proposition set forth to him in Tuscon and Petitioner stated he would see what he could do.

While in the motel room of the Howard Johnson's in Dania, Vendetti indicated he was shown a quarter million dollars. He then proceeded to Petitioner's home where he was staying and told Petitioner what he had seen. Petitioner then advised Vendetti there was some cocaine available in South Florida and that same day Vendetti advised the agents cocaine would be available.

Vendetti traveled with Petitioner to a specific location in South Miami for the purpose of picking up the cocaine. A Mr. Pietro was present there upon their arrival there and Petitioner went into another room of the house with him. Vendetti was asked to stay in the front room.

Petitioner and Pietro appeared in approximately 20 minutes with Pietro carrying a suitcase. Vendetti had given no money to either Pietro or Petitioner.

Vendetti and Petitioner then proceeded back to the Howard Johnson's and parked the vehicle. Vendetti took the briefcase from the vehicle as they exited and such briefcase was never in Petitioner's possession.

Both individuals entered the lounge and Vendetti engaged in a conversation with Bachelier and Ball while Petitioner was seated at a separate table. Petitioner came up to Vendetti during such conversation and then returned to his original seat. Subsequently, Vendetti proceeded upstairs with the briefcase and opened it in the motel room.

Vendetti never told Petitioner from Tuscon about the transaction with the agents, never told Petitioner he wanted a controlled substance in the agents presence, and never told Bachelier or Ball Petitioner was the source of his controlled substance.

Vendetti further admitted asking Petitioner to allow him to use his car and stated Petitioner was never any party to any of the telephone calls testified to. Additionally, Petitioner was not present when Vendetti was shown $250,000 by Ball and Bachelier. Vendetti

indicated to the agents that he, Vendetti, would be the one who would be calling them concerning the transaction. Petitioner was not privy to any conversations occuring in the lounge.

After Vendetti was arrested, Bachelier spoke to Petitioner in the lounge and told him he and Ball were very pleased with the cocaine they had bought. According to Bachelier, Petitioner responded he knew they would be pleased as it was "dynamite stuff." Further, according to Bachelier Petitioner stated he would call his source and find out when the other five pounds could be consummated in response to Bachelier's offer to front him the money.

Bachelier stated Petitioner's name was never mentioned in the Tuscon discussions and was never mentioned when the $250,000 was displayed.

Petitioner never indicated his desire to go with the briefcase and never went upstairs to the room.

Petitioner was in no manner advised of his Miranda warnings prior to the continuing questioning by Bachelier.

12. That this Honorable Court should take jurisdiction of this cause and issue a Writ of Certiorari for the following reasons:

(1) That the Fifth Circuit Court of Appeals, in ruling on the issue raised concerning the failure of Agents Ball and Bachelier to have afforded Petitioner his Miranda Warnings after the investigation had

focused upon him and probable cause for his arrest had developed even though Petitioner was in effect being interrogated, decided an important question of federal law which has not been, but should be, settled by this Honorable Court.

(2) That the decision of the Fifth Circuit Court of Appeals, on the aforementioned issue, additionally decided a federal question in a matter in conflict with the applicable decisions of this Honorable Court, particularly with those of Miranda -v- Arizona, 384 U.S. 436, 86 S.Ct. 1602 and Escobedo -v- Illinois, 378 U.S. 478, 84 S.Ct. 1758 (1964).

(3) That the Fifth Circuit Court of Appeals, in ruling as it did as to the aforementioned issue, in effect allows a federal agent to circumvent the requirement of Miranda through ruse and subterfuge.

(4) That the Fifth Circuit Court of Appeals, in ruling as it did as to the issue raised of the trial court's failure to grant Petitioner's Judgment of Acquittal, decided the issue of whether mere words may supply the necessary criminal intent, without any overt acts, which important question of federal law has not been, but should be, settled by this Honorable Court.

(5) That in ruling as it did on the issue of Petitioner's Motion for Judgment of Acquittal, the Fifth Circuit Court of Appeal rendered a

decision in conflict with decisions of other courts of appeals on the same intent issue.

(6) That in ruling as it did as to the sufficiency of the evidence to permit the introduction against Petitioner of co-conspirator hearsay statements, the Fifth Circuit Court of Appeals, on the issue of whether mere words is sufficient to supply the necessary criminal intent without any overt acts, decided a federal question which has not been, but should be, settled by this Honorable Court.

(7) That in ruling as it did as to the co-conspirator hearsay exception issue, the Fifth Circuit Court of Appeals rendered a decision in conflict with the decision of other courts of appeal on the sufficiency of independent evidence to support the introduction of co-conspirator hearsay evidence against a defendant.

13. That the importance of the questions raised lies in their foundation in the basic tenets of the Fifth and Sixth Amendments to the United States Constitution.

WHEREFORE, Petitioner respectfully prays this Honorable Court issue a Writ of Certiorari to the Fifth Circuit Court of Appeals and order Petitioner's conviction be reversed.

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed to the Solicitor General's Office, Washington, D.C., this day of November, 1979.

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BY_____
MAX P. ENGEL, ESQ.

Appendix

UNITED STATES of America

Plaintiff-Appellee,

v.

David Jason MARKS,

Defendant-Appellant.

No. 79-5137

Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

Oct. 1, 1979.

Defendant was convicted in the United States District Court for the Southern District of Florida at Miami, Jose A. Gonzalez, Jr., J., of conspiracy to distribute, possession with intent to distribute and distributing cocaine. Defendant appealed. The Court of Appeals held that: (1) fact that an agent had probable cause to arrest defendant when they engaged in conversation as part of entering into drug transaction did not require exclusion of statements under *Miranda* rule where defendant had no reason to suppose that he was in the presence of law enforcement officers; (2) where Government's oral motion for incorporation of court's prior ruling on admissibility was granted without

*Rule 18, 5 Cir.; see *Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir., 1970, 431 F.2d 409, Part I.

objection from defense counsel and coconspirator testified and two drug enforcement agents testified without objection that coconspirator had called defendant his "partner, without [whom] we wouldn't have this two kilo front," plain error standard of review was applicable, and where defendant's own conversation with drug enforcement agent sufficed to show existence of conspiracy and defendant's involvement in it, there was no error in admitting evidence of statements made by conconspirator during course of conspiracy; and (3) evidence sustained the conviction.

Affirmed.

1. Criminal Law —412.2(2)

Miranda warnings are not required to one who is not undergoing custodial interrogation, and factors in determining whether interrogation is custodial are whether there was probable cause to arrest, subjective intent of interrogator to hold subject, subjective belief of suspect concerning status of his freedom and whether investigation focused on suspect.

2. Criminal Law —412.2(2)

Fact that agent had probable cause to arrest defendant when they engaged in conversation as part of entering into drug transaction did not require exclusion of statements under *Miranda* rule where defendant has no reason to suppose that he was in presence of law enforcement officers.

3. Criminal Law —1036.1(3)

Where Government's oral motion for incorporation of court's prior ruling on admissibility was granted without objection from defense counsel and coconspirator testified and two drug enforcement agents testified without objection that coconspirator had called defendant his "partner, without [whom] we wouldn't have this two kilo front," plain error standard of review was applicable, and where defendant's own conversation with drug enforcement agent sufficed to show existence of conspiracy and defendant's involvement in it, there was no error in admitting evidence of statements made by coconspirator during course of conspiracy.

4. Conspiracy —47(12)
Drugs and Narcotics —123

In drug prosecution, statements of defendant and coconspirator to law enforcement agents together with coconspirator's testimony at trial provided ample evidence of defendant's criminal intent concerning charged offenses and sustained convictions for conspiracy to distribute, possession with intent to distribute, and distributing cocaine.

Appeal from the United States District Court for the Southern District of Florida.

Before CLARK, GEE and HILL, Circuit Judges.

PER CURIAM:

The factual background of Marks' appeal of his convictions for conspiracy to distribute, possession with

intent to distribute, and distributing cocaine is as follows: After prior arrangements to sell five pounds of cocaine to undercover Agents Ball and Bachelier of the Drug Enforcement Administration, one Vendetti travelled to South Miami with Appellant Marks, where Marks obtained a briefcase containing cocaine. Marks and Vendetti returned to the agents' motel to meet them. Vendetti and Agent Ball sat at the motel lounge bar, while Marks sat at a table behind them. Vendetti informed Ball that he was carrying five pounds of cocaine in his briefcase. When Ball asked Vendetti who Marks was, Vendetti identified him as his partner, saying "without him, we wouldn't have this two kilo front."

The two agents and Vendetti next retired to the agents' motel room, where Vendetti displayed the cocaine. After a sample field-tested positive for cocaine, Vendetti was arrested and detained. Bachelier then returned to the lounge and informed Marks that they were very happy with the cocaine, Marks replying that he knew they would be happy, since the cocaine was "dynamite stuff," adding that he would call his source and find out when another five pounds previously discussed could be delivered. He also stated that it would take forty-five minutes to an hour to go for the cocaine and the same amount of time to return with it. He was then arrested.

Appellant's trial was severed from that of Vendetti, whose conviction was affirmed on all three counts by this court in an unpublished opinion. *United States v. Vendetti,* 594 F.2d 862 (table) (5th Cir. 1979). Appellant's initial jury trial resulted in a mistrial when

the jury was unable to reach a verdict. He was later retried, found guilty on all three counts, and now brings this appeal.

[1,2] Marks challenges the admission of his statements to Special Agent Ball following Vendetti's arrest. It is his contention that even though he was not in custody at the time he made incriminating statements to Special Agent Bachelier, the fact that the agent had probable cause to *arrest* Appellant at the time he engaged him in conversation required the exclusion of Appellant's statements under *Miranda v. Arizona* and *Escobedo v. Illinois,* 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964).

The argument is without merit. There is no occasion to require *Miranda* warnings or to invoke *Miranda*'s exclusionary sanction, unless one speaks while undergoing custodial interrogation. *United States v. Martinez,* 588 F.2d 495, 498 (5th Cir. 1979). This court utilizes four factors in determining whether an interrogation was "custodial": (1) probable cause to arrest, (2) the subjective intent of the interrogators to hold the subject; (3) the subjective belief of the suspect concerning the status of his freedom, and (4) whether the investigation has focused on the suspect. *United States v. Micieli,* 594 F.2d 102, 105 (5th Cir. 1979). Marks' argument is based solely on the presence of the first and fourth of these factors. There is no reason, however, to think that the third factor was present. At the time the federal agent engaged Marks in conversation, Marks was not aware either of the agents' true identities or of Vendetti's arrest. He therefore had no reason to think he was restrained in any manner whatever. Since Appellant's remarks were uttered in a

context completely free from coercion, *Hoffa v. United States,* 385 U.S. 293, 303-04, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966), there is no basis for an inference of a custodial interrogation; thus, no violation of *Miranda* occurred.

[3] Marks also argues that the trial court erred in admitting evidence of Vendetti's statements, made in furtherance of the conspiracy between Vendetti and Marks. The gist of the argument is that there was no showing of the substantial independent evidence required as a predicate to the statements' admission.

In Marks' first trial, the court held an evidentiary hearing of the type prescribed by the panel decision in *United States v. James,* 576 F.2d 1121, 1132 (5th Cir. 1978) (modified en banc, 590 F.2d 575 (5th Cir. 1979)). After hearing testimony of Special Agent Bachelier and the alleged co-conspirator, Vendetti, but without relying on the statements in question, the court concluded that the necessary threshold showing had been made and that Vendetti's statements were admissible.

Before the jury was sworn in the present trial, the government's oral motion for incorporation of the court's prior ruling on admissibility was granted without objection from Marks' counsel. The co-conspirator, Vendetti, testified at re-trial, and both Agents Ball and Bachelier testified without objection, that Vendetti had called Marks his "partner, without [whom] we wouldn't have this two kilo front." Therefore, no objection to admissibility of the statements appears from the record of this trial sufficient to preserve the point for review. Reviewed under the standard of plain error, the point is without merit, since Marks' own conversation with

Special Age..: Bachelier sufficed to show the existence of a conspiracy and Appellant's involvement in it. The trial court therefore did not err in admitting evidence of statements made by Vendetti during the course of the conspiracy.

[4] Marks also questions the sufficiency of the evidence on two of the elements necessary for conviction on each count. He first claims that insufficient evidence was presented on the necessary intent to commit the charged offenses. This contention is meritless: Marks' and Vendetti's statements to Agents Ball and Bachelier, together with Vendetti's testimony at trial, provided ample evidence of Appellant's criminal intent concerning the charged offenses. He also claims that there was insufficient evidence of the identity of the seized substance, since no stipulation was entered before the jury that the controlled substance was cocaine. The assertion is untrue, since such a stipulation was entered at trial. Both Appellant's sufficiency claims are therefore without merit.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-5137

[FILED OCT 31 1979]

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

DAVID JASON MARKS,
Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Florida

ON PETITION FOR REHEARING

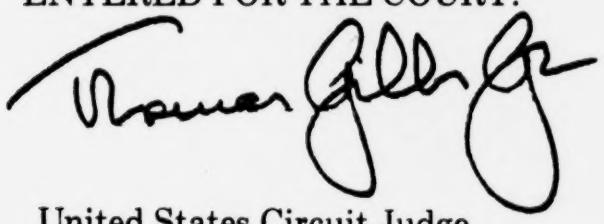
(October 31, 1979)

Before CLARK, GEE and HILL, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:



United States Circuit Judge